SYKT YING MUI SDN BHD

v.

MUTHUSAMY SELLAPAN & OTHER APPEALS

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[CIVIL APPEAL NOS: 11-19-96, 11-20-96, 11-21-96, 11-22-96, 11-23-96, 11-24-96, 11-25-96, 11-26-96, 11-27-96, 11-28-96, 11-29-96, 11-30-96, 11-31-96, 11-32-96, 11-33-96 & 11-34-96]
17 JUNE 1999

CIVIL PROCEDURE: *Affidavits - Swearing of - Whether deponent requires authorization from party of proceeding to affirm an affidavit - Rules of the High Court 1980, O. 41*

CIVIL PROCEDURE: *Affidavits - Relevance - Affidavit deposed by former presiding magistrate - Differences between handwritten notes of proceedings and typed, certified version - Whether affidavit relevant - Whether affidavit could be received and read*

CIVIL PROCEDURE: *Pleadings - Amendment of - Delay in applying - Whether court ought to consider delay*

CIVIL PROCEDURE: *Pleadings - Statement of claim - Amendment - Effect of - Whether amounts to pleading new cause of action - Whether substituting one cause of action with another of inconsistent character*

CIVIL PROCEDURE: *Judgments and orders - Whether decision in one suit may be binding on other suits between same parties - Whether this only possible if there is an order consolidating all the suits*

EVIDENCE: *Documentary evidence - Notes of proceedings - Whether certified copy of typed notes of proceedings must take precedence over handwritten version*

The appellant is the registered owner of a piece of land which is occupied by the respondents in varying portions. The appellant on 7 March 1983 commenced 16 suits against the respective respondents to recover possession of the said land. One of the suits, *ie,* MC 14/83 came up to trial before the learned magistrate, who after hearing the evidence adduced, dismissed the suit. After 10 years had lapsed, the appellant filed an application to amend the statement of claim in the 16 suits. The respondents, supported by an affidavit affirmed by the former magistrate who heard suit MC 14/83, opposed the

application on the ground that the appellant by its counsel had agreed that the decision in MC 14/83 would bind the other 13 suits mentioned in the notes of proceedings. The handwritten notes of proceedings for MC 14/83 stated that the appellant's counsel "agrees" that the decision in MC 14/83 would bind the 13 other suits whereas the certified copy of the typed notes of proceedings for MC 14/83, in place of the word "agrees", used the word "argue". The affidavit of the former magistrate stated that the correct word should be "agrees". The application to amend was dismissed by the court. Dissatisfied with the decision, the appellant appealed on the grounds, *inter alia*, that (1) the certified copies of the typed notes of proceedings must take precedence over the handwritten version; (2) the affidavit of the former magistrate should not be considered and should be taken off the record as he was not a respondent and no where in his affidavit was it stated that he was authorised to affirm the affidavit on behalf of the respondents; (3) delay in applying to amend the statement of claim is not a matter of much importance as the amendment may be made at any stage of the proceedings; and (4) unless there was an order consolidating all the suits, the decision made in MC 14/83 cannot bind the other 13 suits.

Held:

[1] Order 41 of the Rules of the High Court 1980 deals specifically with affidavits filed for use in any cause or matter and is conspicuously silent on any requirement that a deponent must be authorised to swear an affidavit. Authority is not a prerequisite to swearing an affidavit.

[2] Primary evidence means the document itself produced for the inspection of the court which in this instance must refer to the handwritten notes of proceedings and not to the certified notes of proceedings.

[3] The purpose towards which a judicial officer or an ex-judicial officer swears an affidavit determines its desirability, relevance and justification and whilst it would be improper to explain away or add reasons or supplement a decision thereby, a clerical mistake in a record of proceedings will be corrected by judicial intervention once its existence comes to light, despite the record having been certified.

[3a] Since it was the former magistrate's handwriting which was the subject of dispute, his affidavit was very relevant. Upon reading this affidavit, it is clear that the appellant's counsel agreed that the decision in MC 14/83 would bind the 13 other cases mentioned.

[4] An agreement between the parties that a decision in one suit will bind the parties in another suit can arise independent of an order of consolidation.

[5] It is evident that the appellant, by the amendment, was in fact seeking to substitute one cause of action with another of inconsistent character based on facts which are not the same as already pleaded.

[6] The amendment now sought is a veiled attempt to reopen the 13 suits that, as agreed to by the appellant, are bound by the decision in MC 14/83. If the amendment is allowed, it will result in the appellant enjoying an improved position in all 16 suits by being allowed to plead a new cause of action.

[7] After pleadings are deemed to be closed, an amendment can only be made with leave of the court. It becomes a matter at the discretion of the court and when a party requires discretion to be exercised in its favour, delay is always a relevant consideration in the grant or withholding of it because a court will only assist the vigilant and not the indolent.

[Appeal dismissed.]

Case(s) referred to:
Abdul Salam Mohamad Salleh v. PP [1991] 3 CLJ 2251 ***(refd)***
Hansell v. Spink [1943] LR 396 ***(refd)***
Khor Cheng Wah v. Sungei Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(foll)***
Re Hj Sazali Datuk Hj Noor Tahir [1992] 3 CLJ 1753 ***(refd)***
Sabah Bank Bhd v. Pemborong Keningau & Ors [1991] 3 CLJ 2590 ***(dist)***
Yamaha Motors Co Ltd v. Yamaha Malaysia Sdn Bhd [1983] 1 CLJ 191 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 61, 62, 63, 65, 74
Rules of the High Court 1980, O. 20, O. 41 r. 1(4)
Subordinate Courts Rules, O. 8 r. 18, O. 15,

Penal Code [Sing], s. 201

Other source(s) referred to:
Phipson on Evidence, 14th edn, 974

For the appellant - David Hoh; M/s Lim & Hoh
For the respondents - En Athithan; M/s Thevin, Chandran & Wong

Reported by Izzaty Izzuddin

JUDGMENT

Clement Skinner JC:

There are 16 appeals before me which, by order of the High Court, Ipoh, made on 27 November 1997, were consolidated to be heard together. The appellant is the registered owner of a parcel of land described as State Lease 556, Lot 24 Mukim of Ulu Telom, Cameron Highlands, (hereafter the said land) which is occupied by 16 different persons (hereafter the respondents) who each occupy different portions of varying sizes of the said land. On 7 March 1983, the appellant commenced 16 different suits at the Cameron Highlands Magistrate's Court to recover possession of the said land from the respondents.

In all the cases, the appellant's pleadings are in their material parts identical, brief, and consist of four paragraphs only. The whole of the appellant's case is to be found in para 3 and 4 thereof which reads (and here I adopt for convenience, what is pleaded in Rayuan Sivil No. 11-19-96):

> 3. A part of the said piece of land were let by the plaintiff to the defendant by an oral agreement on a monthly tenancy from the 1st day of January 1955 at a rent of RM1.67 per month.
>
> 4. The tenancy was duly determined by a notice to quit dated 17th day of September 1982 and served on the defendant on 19th day September 1982 and which expired on the 18th day of December 1982.

All the respondents filed identical defences. In essence, the respondents aver that they had been cultivating the said land on the undertaking of the appellant that the respondents would be allowed to do so for life. The respondents also aver that the appellant's notice to quit is bad in law and invalid.

That was the state of the pleadings between the parties when on 6 August 1985, Cameron Highlands Magistrate's Court Civil Summons No. 14 of 1983 (hereafter MC14/83) between the appellant and one Cho Chew came on for trial. During the course of that trial, the learned magistrate (who was actually the President of the Sessions Court, Ipoh, but sitting as a magistrate) recorded what transpired between counsel for the appellant and counsel for Cho Chew who also represented the 16 respondents in this appeal. A dispute has now arisen on one crucial word recorded by the learned magistrate. Without at this stage trying to resolve that dispute, I will simply set out the passage recorded by the magistrate and indicate the disputed word in italics. This is how it reads:

argue

Mr. Hoh *agrees* (italics mine) with Thevindran and *vice versa* that the decision in this case will be binding on all the other thirteen Civil Actions No. 4/83, 5/83, 7/83, 8/83, 9/83, 10/83, 11/83, 13/83, 16/83, 19/83, 22/83, 23/83, 24/83 as the plaintiff will be asked the same question and will give the same evidence in all the other 13 above actions, and as the plaintiff is the same in all the actions and also as all the defendants in the 14 actions occupy the same Lease Negeri Lot 44 Mukim of Ulu Telom.

The respondents say that the word "agrees" quoted above is the word appearing in the handwritten notes of proceedings of the learned magistrate and that accordingly, the decision in MC 14/83 is binding on all the 13 other cases mentioned in the notes. The appellant on the other hand says "argue" is correct as this is the word that appears in the certified copy of the typed notes of proceedings in MC 14/83.

After having heard all the evidence adduced by both the appellant and Cho Chew, the learned magistrate dismissed the appellant's claim and give his full reasons for doing so in a written judgment on 21 November 1985.

Some ten years after the decision in MC 14/83, the appellant on 26 September 1995, filed at the Magistrate's Court Cameron Highlands, applications to amend the statements of claim in their 16 suits. By their proposed amendments which are in identical terms, the appellant:

(i) alleges that they became owners of the land since 4 October 1976;

(ii) deletes the whole of their assertion that the said land was let by the appellant to the respondents by an oral agreement on a monthly tenancy from 1 January 1955 at a monthly rental and instead alleges that the said land is occupied by the respondents without the consent and/or permission of the appellant;

(iii) deletes the whole of their assertion that the tenancy was determined by a notice to quit dated 17 September 1982, which was served on 19 September 1982, and instead alleges that upon discovering the name of the respondents the appellant served on the respondents a written notice to vacate that part of the said land occupied by the respondents;

(iv) finally the appellant deletes completely its claim for rent or mesne profits.

The applications to amend came up before the learned magistrate on 13 November 1995, when it was opposed by the respondents. One of the grounds on which the amendments were opposed was that the appellant had agreed by their counsel that the decision in MC 14/83 would bind the other

13 cases recorded in the notes of proceedings. In support of that ground, the respondents filed an affidavit duly sworn by Mr. W. Satchithanandhan on 16 October 1995, (hereafter Mr. Satchi's affidavit) who was the then President of the Sessions Court, Ipoh, but sat as a magistrate and heard MC 14/83. He has since left judicial service and states in his affidavit that he is now in private practice. To Mr Satchi's affidavit is exhibited a copy of his handwritten notes of proceedings recorded in MC 14/83. Mr. Satchi in his affidavit states, *inter alia*:

(a) that it was agreed between counsel who appeared before him for the appellant and respondents respectively that the decision in MC 14/83 will bind all the other Civil Suits referred to in his notes;

(b) that his handwritten notes reads "Mr. Ho agrees with Theivanthiran and *vice versa* that the decision in this case will be binding on all other 13 Civil Actions Nos ...;

(c) that the word "argue" which appears above the word agrees in his handwritten notes is not his notation and that that notation, *ie*, the word "argue", is wrong.

After hearing submissions, the learned magistrate dismissed the appellant's application to amend and has since given reasons for so doing. The learned magistrate found that the appellant had delayed for some 14 years in applying for amendment without any explanation for the delay and that the appellant had agreed to be bound by the decision in MC14/83. Being dissatisfied with that decision, the appellant brings these appeals.

Before me, Mr. David Hoh learned counsel for the appellant referred to the decision of the Federal Court in the case of *Yamaha Motors Co. Ltd. v. Yamaha Malaysia Sdn. Bhd.* [1983] 1 MLJ 213 at p. 214 and submitted that applying the principles of law to be found there, the appellant's application to amend should be allowed as it comes within the principles stated in the *Yamaha* case in that:

1. the appellant's application to amend is made *bona fide*;

2. no prejudice will be suffered by the respondents if the amendments are allowed as the application is being made before the trial of these actions wherefore the respondents can still amend their defences. Any inconvenience caused to the respondents can be compensated in costs;

3. the amendments do not change the character of the suits into another of inconsistent character.

Counsel for the appellant also advanced two further reasons why the amendments should be allowed. Firstly, delay is not a factor the court should pay too much attention to as by O. 15 Subordinate Court Rules (SCR), and its equivalent in O. 20, Rules of the High Court (RHC), amendments may be made at any stage of the proceedings. Secondly, Mr. Satchi's affidavit should not be considered at all in determining this appeal and should instead be taken off the record.

I shall now consider each of the matters raised by the appellant but will take them in the order I find most convenient in deciding the matter at hand.

Mr Satchi's Affidavit

Counsel for the appellant has made a concerted effort to exclude Mr. Satchi's affidavit from these proceedings and has given various reasons for doing so. It is said that Mr. Satchi is not a respondent in any of these 16 appeals and he has not stated in his affidavit that he has been authorised by any of the respondents to affirm his affidavit on their behalf. Counsel for the appellant has not referred to any case law or rules of court to support his contention which suggests that apart from affidavits sworn by the parties themselves, the only other affidavits that may be read in a cause or matter are those sworn to by persons who have been authorised to do so by a party in those proceedings. In *Sabah Bank Bhd. v. Pemborong Keningau & 8 Ors.* [1991] 3 CLJ 2590, the court deleted an affidavit from the record on the grounds that it was sworn to by the solicitor for the defendant. In doing so, the court stated that affidavits are personal to those who swear them and so it is not the business of anyone else unless he is so authorised to depose an affidavit. With respect, I am unable to agree with that decision in so far as it relates to authorisation to swear an affidavit. Order 41 RHC deals specifically with affidavits filed for use in any cause or matter and is conspicuously silent on any requirement that a deponent must be authorised to swear an affidavit. It is pertinent to note that by r. 1(4) of the Order, an employee of a party to a cause or matter may swear an affidavit but the affidavit must state that fact. There is however no requirement that such employee must go on further to state that he is also authorised to swear the affidavit before it can be read in the cause or matter. This shows that authority is not a prerequisite to swearing an affidavit. If that be the case, I can see no justification for the imposition of such a requirement on any deponent of an affidavit. Perhaps the position becomes clearer by looking at how evidence is adduced in court at different stages of a cause or matter. At trial, evidence will normally be introduced through the oral testimony of a witness but there is no requirement that before a person testifies, he must be authorised to do so by the party who calls him. If authority to testify is not a prerequisite at a trial that position must surely

not change just because a matter is at an interlocutory stage when evidence is introduced through affidavit evidence. I accordingly find no reason to exclude Mr. Satchi's affidavit on this ground.

It is next said that the typed notes of proceedings in MC 14/83, which have been certified by the magistrate, Cameron Highlands, (not Mr. Satchi) must take precedence or prevail over the handwritten notes of proceedings of Mr. Satchi because, according to counsel, the typed certified notes constitute primary evidence whilst the handwritten notes of Mr. Satchi only constitutes secondary evidence. I regret I do not agree with this submission because by s. 62 of the Evidence Act 1950 (the Act), primary evidence means the document itself produced for the inspection of the court which in this instance must refer to the handwritten notes of proceedings and not to the certified notes of proceedings, which, by the provision of s. 63 read with ss. 65 and 74 of the Act, clearly falls within the definition of secondary evidence.

Having said that, I draw attention to s. 61 of the Act which states that the contents of documents may be proved either by primary or secondary evidence. That being the position, the question of which notes of proceedings should take precedence over the other does not arise. The real question for decision is, which notes of proceedings reflects the correct position and that question will be dealt with shortly. It is for the above reasons that I have not found it necessary to consider the reference to *Phipson on Evidence* 14th edn. 974 and the case of *Hansell v. Spink* [1943] LR 396, referred to by counsel for the appellant.

It is lastly said that it is unheard of for an ex-Sessions Court judge, to come back after a decade and amend the certified notes of proceedings thereby attempting to change the entire complexion of the notes. It is counsel's submission that to do so is wrong, unjustifiable and bad practice because if every ex-judge were to swear affidavits in respects of cases he had presided over a decade ago so as to change the certified notes of proceedings this would lead to chaos in the courts. Counsel accordingly submitted that Mr. Satchi's affidavit is contrary to public policy, scandalous, irrelevant or is otherwise oppressive and should be struck out.

The question is, does Mr. Satchi's affidavit attempt to do what counsel says it does and can it be characterised in the manner counsel has. Before turning to the contents of Mr. Satchi's affidavit, I wish to refer to two cases in which judicial opinion has been expressed on the question of an affidavit being sworn or a written explanation offered by a judicial officer in respect of a matter he has presided over. Notwithstanding that the opinions are expressed in criminal proceedings, my view is that they would be no less applicable in civil proceedings. In *re: Haji Sazali bin Datuk Haji Noor Tahir* [1992] 3 CLJ 1753,

a magistrate had remanded a person at a Drug Rehabilitation Centre for two years. On an application to quash the order, the magistrate filed an affidavit in which he averred that he had considered all the relevant matters so required of him by law. The notes of proceedings however did not show this to be so. On being urged by counsel to exclude the affidavit as irrelevant, Chong Siew Fai J, (as his Lordship then was) said:

> On the facts and circumstances of the instant case, I agree that it is not open or appropriate for the learned Magistrate to subsequently explain away or add reason to his decision by stating as he did ... when in his judgment contained in the notes of proceedings he apparently was not shown to have done so.

A little later in the same judgment, the learned judge went on to say:

> However, I must not be taken to mean that under no circumstances can a presiding Magistrate make an affidavit when his decision is the subject matter of judicial review. That would be too general a statement. In certain circumstances he might be justified and, indeed, entitled to do so or even to appear at the hearing, for example, when his character or *bona fides* is called in question. *R v. Camborne JJ ex. P Pearce [1955] 1 QB 41, R v. Thorton & Ors. JJ.* [1898] 67 LJ QB 249.

In the Singapore case of *Abdul Salam bin Mohamad Salleh v. Public Prosecutor* [1991] 3 CLJ 2251; [1991] 3 MLJ 280, a police sergeant was charged with causing evidence to disappear contrary to s. 201 Penal Code. He was tried before a district court and on conviction appealed. When the certified typewritten notes of evidence were supplied for the preparation of the record of appeal, it was discovered that the district judge had recorded in his notes that at the end of the prosecution's case the defence was called on an amended charge. There had in fact been no application for any amendment by anyone. The appellant complained on appeal that the amendment was false. Whilst the appeal was in progress, the district judge who had by then become the Registrar of Trade Marks, and was therefore not in a position to contradict the certified typewritten notes of evidence wrote a letter to explain that he had it in mind to amend the charge but had inadvertently failed to do so. After arguments and whilst judgment on the appeal was reserved, the district judge had an opportunity to check his handwritten manuscript notes against the certified typed notes and noticed that the typist had misread the word 'original' charge in his manuscript notes and typed it as 'amended' charge in the certified notes. The district judge accordingly wrote a second letter to explain what had happened and that his first explanation was in error. The learned judge accepted that the word in the handwritten manuscript notes of the district judge was legible and it read 'original' and not 'amended' and that accordingly the appellant was properly convicted. On permission being granted to refer a question to the Court of Criminal Appeal, one of the four questions posed

was: whether the signed copy of the record of the trial may be corrected by reference to the original manuscript. That question was answered in the following way:

> There is no rule of law that required a clerical mistake in typing a court record from a handwritten manuscript to be preserved or which protected it from being corrected. The fact that the trial record had been signed could not prevent the mistake from being corrected once its existence came to light.

Thus, what emerges from a reading of the above cases is that the purpose towards which a judicial officer or an ex-judicial officer swears an affidavit determines its desirability relevance and justification and whilst it would be improper to explain away or add reasons or supplement a decision thereby, a clerical mistake in a record of proceedings will be corrected by judicial intervention once its existence comes to light, despite the record having been certified. With those observations in mind I now turn to Mr. Satchi's affidavit.

A reading of it shows that it is a straight forward account of what transpired in front of him sitting as a magistrate and what he recorded in his hand written notes of evidence, without in any way making reference to the certified notes of proceedings or attempting to amend the latter as alleged. Since it is his own hand-writing that is now the subject of dispute, I find Mr. Satchi's affidavit very relevant to the issue at hand. It is apparent from looking at his handwritten notes that whoever had the task of preparing the typed notes of proceedings had some difficulty deciphering his writing because throughout the relevant page, there are many instances where immediately above a particular written word another word appears, spelling out more legibly the word it deciphers or attempts to decipher. And it is with reference to the work "argue" which appears above his own written word that Mr. Satchi has directed para. 7 and 8 of his affidavit which reads as follows:

> 7. I pray leave to this Honourable Court to refer to exhibit "WS-2", wherein the paragraph highlighted in yellow reads as follows:
>
> > Mr. Hoh **agrees** with Theivanthiran and *vice versa* that the decision in this case will be binding on all the other 13 Civil Actions No. 4/83, 5/83, 7/83, 8/83, 9/83, 10/83, 11/83, 13/83, 16/83, 19/83, 22/83, 23/83, 24/83 as the Plaintiff will be asked the same questions and will give the same evidence in all the other 13 above actions, and that the Plaintiff is the same in all the 16 actions and also all the Defendants in the 14 actions occupy the same lease Negeri Lot 24 Mukim of Ulu Telom.
>
> 8. I further state that word "argues" which is marked in blue which appears above the word agrees is not my notation. Further I say that the said notation is wrong.

I find this explanation acceptable and one that accords with my own finding that in the handwritten notes the word agrees is quite legible and that the word 'argue' is obviously a clerical error at deciphering the word 'agrees'. I also find that the word "agrees" gives to the rest of the recorded passage its correct sense and meaning whereas the word "argue" renders the whole of the passage in which it is found meaningless. As pointed out by counsel for the respondents, if there was no agreement to be bound, the presiding magistrate would not need to record that fact in his notes of proceedings since the matter would not have arisen for discussion in MC 14/83. With that submission I agree.

In the circumstances I am satisfied that Mr. Satchi was fully justified in swearing his affidavit which cannot be categorised as scandalous, irrelevant or oppressive as the appellant has sought to. Mr. Satchi's affidavit should not be struck out but instead received and read, and when this is done it becomes clear that the appellant had by their counsel agreed that the decision in MC 14/83 would bind the 13 other cases mentioned. That being the case, it is not open to the appellant to now apply to amend their statements' of claim in those 13 cases. As regards four of the present appeals which are not part of the 13 cases mentioned in the notes of proceedings in MC 14/83, namely MC 15/83, MC 27/83, MC 18/83 and MC 20/83, I find the decision in MC 14/83 did not bind them. There is no legal basis for the submissions of Mr. Atithan, learned counsel for the respondents that because these four appeals were always treated like the other 13 cases, by implication the decision in MC 14/83 will apply to them. However, this does not mean that the appellant succeeds in this appeal in respect of these four cases for reasons that become apparent soon. I also wish to make it clear that in arriving at my decision that the appellant had agreed that the decision in MC 14/83 will bind the 13 other cases, I have not found it necessary to rely on the four judgments written by Mr. Satchi in MC 15/83, MC 17/83, MC 18/83 and MC 20/83 or on para. 12 and 13 of his affidavit.

Before leaving this subject there is a submission of counsel for the appellant that needs to be addressed. It is said that unless there was an order consolidating all the suits pursuant to O. 8 r. 18 SCR, the decision made in MC 14/83 cannot bind the other 13 suits. I regret I am unable to agree with this submission because a proper reading of that order shows that nowhere is it stated that on a consolidation of several actions, a decision in one will bind the others. An agreement between the parties that a decision in one suit will bind the parties in another suit can therefore arise independent of an order of consolidation.

Do The Amendments Change The Character Of The Suits

It is the appellant's case that the amendments do not change the character of the suit because the relief prayed for, namely, possession of the said land remains unchanged and that even if the character of the suits do change, the amendments should be allowed as they are founded on the same facts as already pleaded.

Whilst I agree that the relief sought remaining unchanged is a factor that should be taken into account, in my judgment, the court will concern itself more with the facts relied upon by the appellant in claiming that relief because it is principally upon those facts that the court will arrive at a finding on whether or not the character of the suit has changed. On the facts as presently pleaded, the appellant's claim to possession of the said land is founded on a cause of action pleaded in tenancy, an oral tenancy to be exact, and one which had been duly terminated by a proper notice to quit. However, what the amendments seek to do is to assert a right to possession founded on a cause of action pleaded essentially in trespass, even though the word trespass is not actually used, which relies upon the following new facts which were not pleaded before:

(a) the appellant only become owners of the land in 1976;

(b) the respondents occupy the said land without the consent and/or permission of the appellant.

(c) Upon discovering the name of the respondents the appellant served on the respondents a notice to vacate the land.

It is evident that the appellant in fact seeks to substitute one cause of action with another of inconsistent character based on facts which are not the same or substantially the same as already pleaded; a tenancy and rights associated with tenancy essentially arise out of contract whereas, trespass is founded in tort. I therefore find counsel's submission on this issue cannot be supported.

Delay, Bona fides And Prejudice

Counsel for the appellant submits that the court should not concern itself too much with the question of delay because an amendment may be made at any stage of the proceedings. The submission of counsel overlooks one important factor, it is this: after pleadings are deemed to be closed, an amendment can be made only with leave of the court; it becomes a matter at the discretion of the court and when a party requires discretion to be exercised in its favour, delay is always a relevant consideration in the grant or withholding of it because a court will only assist the vigilant and not the indolent (see *Khor*

Cheng Wah v. Sungei Way Leasing Sdn. Bhd. [1996] 1 MLJ 223 p. 229). The pleadings have long closed in all these cases and the appellant has waited for some 12 years in applying for amendments without any explanation why they have not come sooner, and must accordingly be a factor to be given some weight when considering the overall question of whether or not an amendment should be allowed. I also find that the delay in making the application to amend reflects the *bona fides* of the appellant in only seeking the amendment now.

The ostensible reason for the amendment is stated in para. 4 of the affidavit sworn by Mr. Hoh Kiang Po in support of the appellant's application. He states that the amendments are sought to bring all the true facts to the forefront of the Honourable Court. Now, if the appellant has been owner of the said land since 1976 and if since 1982 they were aware of the presence of the respondents on their land as trespassers and if since 1982 they had given them notice to leave as alleged, why has it taken them some 12 years to come forward to put these facts before the court. To me, the fact that they only seek to do so now indicates that this amendment is a belated manoeuver designed to extricate the appellant from the awful position they have found themselves in with the result in MC 14/83 where the learned magistrate found an equity in favour of the defendant in that suit to remain on the said land for life. Having agreed to be bound by that decision, the appellants are similarly obliged to let 12 out of the 16 appellants here remain for life on the said land. The amendments now sought are a veiled attempt to reopen the 13 suits in which the appellant is bound by the decision in MC 14/83 and if allowed will result in the appellant enjoying an improved position in all 16 suits by being allowed to plead a new cause of action and one that is free for the infirmities of the case pleaded in tenancy upon which findings of fact have been arrived at in MC 14/83. In the circumstances, I find the application clearly lacks *bona fides*.

I also find that if allowed, the amendments would result in prejudice to the respondents which cannot be compensated for by payment of cost because insofar as 12 of the present 16 respondents are concerned, their cases have been decided with certainty in their favour some 12 years ago; to allow the amendments would result in their cases being reopened which in turn would result in uncertainty hanging over their heads once again. This is a matter that cannot be compensated in costs. As regards the four respondents in MC 15/83, MC 17/83, MC 18/83 and MC 20/83, whilst they do not enjoy the same position as the other 13 respondents, the attempt by the appellant to change the character of their suits, the delay of the appellant in making this application and the lack of *bona fides* in so doing would prevent the court from exercising discretion in favour of granting the application. It would in the circumstances be manifestly unjust to do so.

With reference to the submission of counsel for the appellant that as the respondents have not themselves filed any affidavit in reply to the affidavit sworn by Hoh Kian Po in support of the appellant's application to amend it is not open to the respondents to take the objections on delay, prejudice, and *bona fides* as they have done, I found no merit in this submission. Firstly, the affidavit of Hoh Kian Po does not itself make any material assertions of fact on these matters which call for a specific reply, and secondly, it is open to the respondents to take these objections and base their submissions on the undisputed facts already disclosed in the material before the court.

I accordingly dismiss all these appeals with costs. The decision of the learned magistrate is affirmed.